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351-219—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1313

C. EMILY FRECCIA, A/K/A MRS. CLYDE BANKS; FRANK J. FRECCIA, A/K/A FRANK J. FRECCIA, SR.; FRANK A. DOEBERL AND JOSEPH B. MASTOCCIOLO, A/K/A JOSE MASTO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals wrote no opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1969. A petition for rehearing was denied on March 26, 1969. The petition for a writ of certiorari was filed on April 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government improperly brought into question the authenticity of certain signatures,

suppressed evidence thereon or otherwise misused such evidence.

2. Whether the trial court asked an improper question of a petitioner.

3. Whether the evidence supported the petitioners' convictions for mail fraud and conspiracy.

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioners were convicted of mail fraud affecting banking institutions, car dealers and life insurance companies, and of conspiracy to commit these offenses, in violation of 18 U.S.C. 1341 and 371.[1] Concurrent sentences of imprisonment and total fines were imposed as follows: Emily Freccia, five years and $25,000, plus five years' probation on count 18; Frank Freccia, four years and $15,000; Doeberl, a year and a day and $2,500; Mastocciolo, one year and $2,500 (R. 1–12, 61–68). The court of appeals affirmed per curiam.

The evidence establishing the mail fraud showed that in July 1961, Clyde Banks, a resident of Greenwich, Connecticut, was found to be suffering from Hodgkin's disease, an incurable malignant disorder involving the lymphoid system (Tr. 98, 101, 128, 137).[2] The average life expectancy of an individual suffering

[1] The indictment consisted of seventeen substantive counts and a conspiracy count. Substantive counts 5 and 13 were dismissed by the government at the close of the government's evidence. Verdicts of guilty against all petitioners were rendered on the remaining 14 counts.

[2] Banks, who was deceased at the time of the return of the indictment, was named as a co-conspirator (R. 10).

from the disease has been found to be forty-three months from the time of diagnosis (Tr. 138). By August 1962, Banks appeared to have passed into "stage three" of the disease, which indicated that he would probably be dead within twelve to twenty-four months (Tr. 143, 171, 174).

Petitioners Frank and Emily Freccia, brother and sister, who had brought Banks to the attending physician, exhibited some curiosity about his condition, but the doctor refused to give them any information because they were not members of the family (Tr. 296–302). In June 1962, the Freccias learned from Banks' former wife that he had only about a year to live. At that time, Miss Freccia suggested to the former wife that she take out an insurance policy of forty to fifty thousand dollars on Banks' life (Tr. 1759–1762).

A number of loan transactions took place thereafter in which Banks would appear as a co-signer on a note with Miss Freccia, with provision for insurance on Banks for any unpaid balance due on the loan in the event of his death. Miss Freccia would deposit in the institution an amount equal to the amount of the loan, leaving the passbook as security. The proceeds of the loans would be deposited to the credit of a realty company operated by Frank and Emily Freccia (Tr. 542–554, 649–652, 680–692, 727–733, 789–793, 843–861, 882–887, 993–998, 1001–1024, 1147–1167). Similar transactions took place, in which petitioner Mastocciolo also participated as a co-signer with Banks, in the purchase of automobiles. The contracts contained an insurance clause providing that the installment loan would become fully paid on Banks' death. Five

Cadillacs, four Chevrolets, one jeep and one school bus were thus acquired by petitioners (Tr. 1179–1190, 1308–1317, 1349, 1488, 1514).

The exact extent to which Banks himself, or Doeberl representing himself to be Banks, entered into these transactions was not clear. The two men had a strong physical resemblance (Tr. 239, 1102), although their manner of speech was entirely different (Tr. 549, 1596–1597). As to some of the transactions, there was positive testimony that Doeberl represented that he was Banks and presented identification papers of Banks (Tr. 553–554, 882–885, 1189). Some of these appearances took place when Banks was in the hospital (Tr. 89; Govt. Exh. 1). An examination of the signatures on the loan documents by a handwriting expert of the Postal Department led to inconclusive results. Although the report was made available to petitioners during trial and the expert was present at their request, neither side called him as a witness (see *infra,* pp. 6–10).

Banks supposedly was married to Miss Freccia in the fall of 1963, at which time he moved into a basement apartment at the rear of the Freccias' place of business in Greenwich (Tr. 1306, 1603–1604, 1887–1888, 2102). On May 29, 1964, Banks died (Tr. 1654, 1766). Miss Freccia told an employee of one of the lending institutions, who called after seeing a notice in the paper, that Banks' death was very sudden and a great surprise to her (Tr. 1301–1304).

Following Banks' death, an attorney representing the Freccias wrote a number of letters endeavoring to recover the collateral which had been pledged on the

loans in question (Tr. 1847, 1895, 1985; Govt. Exhs. 50, 87, 89, 152). The mails were also used for various other dealings between petitioners and the lending institutions (Govt. Exhs. 28–31, 43, 49, 58–62, 64, 74, 84–91, 96). A business acquaintance of petitioners, who had been asked by Miss Freccia to intercede at one of the banks to secure the release of monies claimed by her, testified that Miss Freccia admitted that she had used Banks' name in some loan transactions and had "beat" the lenders (Tr. 2088–2103). Doeberl admitted that he had posed as Banks on some loans (Tr. 2085–2087).

ARGUMENT

1. Petitioner's principal contention (Pet. 6–10) is that the government trial counsel suppressed evidence, misrepresented his case and made improper argument concerning the authenticity of certain purported signatures of Banks. The record wholly refutes this claim.

The exploitation of this supposed issue began on the fifth day of the trial. An officer of one of the lending institutions that had made loans to petitioners testified that on January 31, 1964, Miss Freccia and a person introduced as "Clyde Banks" talked with him about a loan and that "Banks" signed a note in his presence. He identified "Banks" as petitioner Doeberl (Tr. 882–888).

Defense counsel objected that this amounted to saying that the note was a forgery, without charging anyone with it.[3] The government attorney replied

[3] The officer further testified, however, that delivery of the note to the bank took place on a later day, and that he therefore could not say that it was the same note which he saw "Banks" sign (Tr. 886–887).

that forgery was a state offense and that the law did not require that a defendant be charged with every crime he had committed (Tr. 888–889). A second defense counsel had stated that prior to trial government counsel had commendably supplied particulars and had made disclosures helpful in preparation of the defense, but that the defense had relied on his representation at the time that the government was not calling handwriting experts and that forgery was not claimed. Defense counsel urged the court that the government should be required to say if the signatures were forgeries and, if so, then the defense should be accorded an opportunity to retain and prepare handwriting experts to rebut that contention (Tr. 936–938).

Government counsel responded that he had several conversations with defense counsel before trial and disclosed nearly all of the government evidence. He told counsel that the government would offer no handwriting testimony; that the indictment alleged a misrepresentation by Doeberl that he was Banks, but made no allegation of forgery. He further stated that a handwriting expert had inspected the various documents and had made a report which he would be glad to show the defense; that he had not made this report available earlier because he did not think the conclusions therein expressed were sufficiently positive to help either side; and that the witness on the stand had not testified that the note had been forged, but that he had seen Doeberl sign a document and that Miss Freccia had come back later with a note which may have been the same one and may have been another

(Tr. 941–944). Government counsel concluded (Tr. 945):

> I made no allegation of forgery. I am not going into that question. If the jury wants to make an inference that there was a forgery I am not going to stop them. But I certainly will not argue it to the jury.

He then turned over the report of the handwriting expert (Court Exh. 20).

In overruling the defense objection, the court stated that it was "impressed with the frankness and candor of the Government's statement", which was "fair and specific", and that the defendants could act accordingly in preparing any defense that they might have (Tr. 947–949). Petitioners later requested that the government bring the expert to the trial, which was done (Tr. 1373–1376). Neither he nor any other handwriting expert was placed on the stand.

In summation, counsel for Miss Freccia and Doeberl denounced the government for claiming forgery but not producing a handwriting expert to prove the charge, and demanded to know the whereabouts of the expert who had examined the signatures, claiming that the failure of the government to call him as a witness established that no petitioner forged Banks' signature.[4] In reply, the Assistant United States Attorney said (Tr. 2549): "I will say that we had a handwriting expert here who is sitting in the court room." Counsel

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[4] Defense counsel argued in part (Tr. 2532–2535):

"If there was any question that Mr. Doeberl ever signed his name in lieu of Clyde Banks, or that Miss Freccia did or that

objected that there was no evidence as to this. The following then transpired:

> The COURT. Well, that is a matter that I will grant goes beyond the evidence. But I do think it is fair to state, and I will take the responsibility of doing this, and I will suggest that this might terminate the debate on this point.
>
> At the request of defendant's counsel a handwriting expert who had examined certain documents at the request of the government did come down here at the request of the Court to be available to either side if they cared to call him and a report that he prepared was available to both sides.
>
> A decision was made by counsel on both sides—I had nothing to do with that—that wit-

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Mr. Masto did or Mr. Frank Freccia did, the Government would have them in here for forgery. At the very least you would have heard from a United States Postal, probably a senior handwriting examiner—and they can call upon the FBI for help or any one else they choose to call for in connection with help to have evidence brought before you that these were indeed forgeries or questionable signatures."

* * * * *

"Where is the man? Where is he? The acknowledged handwriting expert the Government saw fit to call upon to do this work and then cheerfully ignored this trial? Why call almost forty witnesses and leave him home? Do you know why? They didn't like what he was going to say and that's why they left him home."

* * * * *

"And once again, just like the marriage, you don't hint that a man is a forger. If you are going to accuse him you accuse him. You don't say we think he was almost a forger or maybe he was a forger. * * * Where is your Postal handwriting expert? Bring him in here. That's how you do it."

ness need not be called, and he was not called by either side.

Now that, I think, is in substance what the situation is about. I will suggest that if counsel think my statement of it is fair that they leave it as it is.

Mr. HEYMAN. I think it is perfectly fair, your Honor.

Next, Mr. McNamara made a large point about—first I might say something about handwriting. Of course, not every forgery can be detected. Handwriting experts are not foolproof. * * *

And only Mr. Purdy could tell that that wasn't his signature.

Mr. MCNAMARA. May it please the Court, I think this is clearly now out of order. These people are not charged with forgery. Any suggestion that they are guilty of it is most improper.

Mr. HEYMAN. This matter was injected——

The COURT. I will overrule the objection, but I will state to the jury that forgery is not a crime charged in this case. You will not be called upon to make any determination of anything except the crimes charged in the indictment.

Mr. HEYMAN. That is correct. But I do argue, Ladies and Gentlemen of the jury, that there is evidence of forgery in this case.

Mr. MCNAMARA. May it please the Court, that is just the contrary of what your Honor just said.

Mr. HEYMAN. No, I don't think it is at all.

Mr. MCNAMARA. I don't know how else you can say that, Judge.

> The COURT. I will ask counsel, if possible, to avoid the use of that term. I think it may be possible to describe anything that is in evidence in a way that does not employ the use of a reference to a crime which is not here charged.
>
> Mr. HEYMAN. So there is some evidence, Ladies and Gentlemen, that those signatures that were on the cards, that were submitted as exhibits for the defendants, were not authentic signatures. [Tr. 2549–2551.]

Later, in the absence of the jury, objection was made to these proceedings. The court said that it felt called upon to make a statement, but that if the question was not handled fairly, he would welcome any suggestion. Defense counsel said that the error could not be remedied, whereupon the court said that it would leave the matter as it stood (Tr. 2585–2589).

As the foregoing demonstrates, the government was candid about its evidence, withholding nothing of benefit to the defense. When the report was made available to petitioners, the estimate of its limited significance was seen to be justified. This case, in short, is hardly comparable to the failure to disclose the confession of a co-defendant that it was actually he who had committed the homicide, which this Court found to be violation of due process in *Brady* v. *Maryland*, 373 U.S. 83. Moreover, defense counsel, with full opportunity to do so, called neither the postal expert nor any other handwriting expert as a witness. Instead, he persisted in pursuing the question of whether there was forgery in his summation, in an obvious attempt to discredit the government's case. In these

circumstances, the limited government response was invited and hardly prejudicial. The court's statement in this regard was also free of error. It accurately answered counsel's demand to know where this expert was—*i.e.*, that he was in the courtroom, available to either party.

We note finally that this entire issue has been blown up all out of proportion to its actual importance. The essence of the fraud perpetrated by petitioners was to insure the amounts of loans and unpaid balances on automobiles on the life of Banks, with knowledge that he would shortly die from an incurable disease,[5] so that these loans would not have to be repaid and the automobiles would not have to be fully paid for. The evidence showed that as a step to achieve this fraud, Doeberl on occasion misrepresented himself as Banks. The question of forgery was unrelated to the case and was interjected by defense counsel.

2. Prejudicial error is also claimed because of a question by the court during Miss Freccia's testimony. She had testified that she owned a taxicab franchise in a neighboring town, and had purchased the business for Banks because it was an easy business; she explained that it was undesirable for Banks to own anything in his own name because of financial pressure from his ex-wife and because his insurance would be higher in view of his past record. For this reason, she said, the bills of sale were taken in Banks' name,

[5] Petitioners to the contrary, the evidence adequately sustained the allegation in the indictment that Hodgkin's disease is incurable (Tr. 98, 101, 128, 137).

but registered in the name of the co-buyer (Tr. 2315–2323). The court then said (Tr. 2323):

> The thing that escapes me, and I just leave it entirely to counsel—it is not my function to ask questions—but I don't quite see why these cars were taken in the name of Clyde Banks as a co-buyer for the reasons that Miss Freccia gave; in short, that the rate of insurance would be too great and pressure from his ex-wife was too great.
>
> If that is so, why was it necessary to have him named as a co-buyer at all?

Her counsel asked her to explain that, to which Miss Freccia replied, "Clyde wanted it that way. Clyde wanted his signature and his name." (Tr. 2324–2325).

At the recess which followed, her counsel said that the jurors might take it as an expression of the court's doubts, which he was sure the court would not want (Tr. 2328). The court said that he thought that counsel or the witness had overlooked the question, and believed it should be asked while the matter was fresh in everybody's mind. He considered her answer to have been direct and responsive; but if counsel thought the jurors might attach particular significance to the question because it was asked by the court, he would be glad to give a cautionary instruction (Tr. 2331–2337). At counsel's suggestion, this was done at a subsequent time, so as not to emphasize the matter (Tr. 2383–2386).

Nothing in the record supports an inference that the judge was attempting to assume the role of an advocate or to cast doubt on the witness' testimony. The court sought only to clarify a matter which was

somewhat obscure. "The judge conducting a jury trial in a federal court is 'not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.'" *Quercia* v. *United States,* 289 U.S. 466, 469; *Glasser* v. *United States,* 315 U.S. 60, 82.

3. The evidence sustained the existence of a conspiracy by petitioners to use the mails to defraud. All were shown to have had a part in the scheme—Miss Freccia, by her active participation in obtaining the loans; Frank Freccia, by receiving the proceeds of such loans into the partnership account; Doeberl, by masquerading as Banks; Mastocciolo, by his participation in the motor vehicle purchases.

Mail fraud was properly charged. The fact that petitioners themselves may not have mailed certain of the "count letters" is not significant. Where one acts with knowledge that use of the mails will ordinarily follow, or such use can reasonably be foreseen even though not actually intended, he causes the mails to be used. *Pereira* v. *United States,* 347 U.S. 1.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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